

Exceptions to 5-Year Limit in 38 U.S.C. § 4312 (c) USERRA

Notes:

- Effective with enactment of the Reserve Officer Personnel Management Act on October 6, 1994, several of the section numbers of title 10 that are referenced as exceptions to the five-year limit have been changed. In such cases, the new section number is noted in brackets after the section number stated in USERRA [12301(a)].
- The term “Reservist” means member of the National Guard or Reserve. Sections that apply only to National Guard or only to Coast Guard Reserve are identified as such.
- State call-ups of National guard members are not protected under USERRA.
- The symbol “§” means “section.”

38 U.S.C. § 4312 “... does not exceed five years, except that any such period of service shall not include...”

Obligated Service -- 4312(c)(1)

Applies to initial obligations incurred beyond five years.

Unable to Obtain Release -- 4312(c)(2)

Self explanatory. Needs to be documented on a case-by-case basis.

Training Requirement -- 4312(c)(3)

10 U.S.C. § 10147	RESERVIST regularly scheduled inactive duty training (drills) and annual training.
10 U.S.C. § 10148	RESERVIST ordered to active duty up to forty-five days because of unsatisfactory participation.
32 U.S.C. § 502(a)	NATIONAL GUARD regularly scheduled inactive duty training and annual training.
32 U.S.C. § 503	NATIONAL GUARD active duty for encampments, maneuvers, other exercises for field or coastal defense.
10 U.S.C. § 12301(a)	involuntary active duty in wartime

Specific Active Duty Provisions – 4312(c)(4)(A)

10 U.S.C. §12301(g)	retention on active duty while in captive status.
10 U.S.C. §12302	involuntary active duty for national emergency up to 24 months.
10 U.S.C. §12304	involuntary active duty for operational mission up to 270 days.
10 U.S.C. §12305	involuntary retention of critical persons on active duty during a period of crisis or other specific condition.
10 U.S.C. §688	involuntary active duty by retirees.
14 U.S.C. §331	COAST GUARD involuntary active duty by retired officer.
14 U.S.C. §332	COAST GUARD voluntary active duty by retired officer.
14 U.S.C. §359	COAST GUARD involuntary active duty by retired enlisted member.
14 U.S.C. §360	COAST GUARD voluntary active duty by retired enlisted member.
14 U.S.C. §367	COAST GUARD involuntary retention of enlisted member.
14 U.S.C. §712	COAST GUARD involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

War or Declared National Emergency -- 4312(c)(4)(B)

Provides that active duty (other than for training) in time of war or national emergency is exempt from the five-year limit whether voluntary or involuntary.

Critical Operational Mission -- 4312(c)(4)(C)

Provides that active duty (other than for training) in support of an operational mission for which Reservists have been activated under 10 U.S.C. §673b[12304] is exempt from the five-year limit, whether voluntary or involuntary. Note: In such a situation, involuntary call-ups would be under §673b[12304]. Volunteers may be ordered to active duty under a different authority.

Critical Missions or Requirements -- 4312(c)(4)(D)

Provides that active duty in support of certain critical missions and requirements is exempt from the 5-year limit, whether voluntary or involuntary. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of Reserves were not exercised.

Specific National Guard Provisions -- 4312(c)(4)(E)

10 U.S.C. chapter 15	NATIONAL GUARD call into Federal service to suppress insurrection, domestic violence, etc.
10 U.S.C. §3500	ARMY NATIONAL GUARD call into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces.
10 U.S.C. §8500	AIR NATIONAL GUARD call into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces.

The National Committee for Employer Support of the Guard and Reserve will keep the VETS national office informed of developments in this area as they occur (e.g., the manner in which the necessity of additional Reserve training is to be documented).

20 C.F.R. "Exemptions to 5 year cumulative service"

Sec. 1002.100: The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

Sec. 1002.101: An employee is entitled to a leave of absence for uniformed service for up to five years with each employer for whom he or she works. When the employee takes a position with a new employer, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an employee is employed by more than one employer, a separate five-year period runs as to each employer independently, even if those employers share or co-determine the employee's terms and conditions of employment.

Sec. 1002.102: USERRA provides reemployment rights to which an employee may become entitled beginning on or after December 12, 1994, but any uniformed service performed before December 12, 1994, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

Sec. 1002.103: USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years

because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and, (ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

- (i) 10 U.S.C. 688 (involuntary active duty by a military retiree);
- (ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);
- (iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);
- (iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);
- (v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);
- (vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);
- (vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);
- (viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);
- (ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);
- (x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);
- (xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and
- (xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if the employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service performed in a uniformed service if the employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,

(8) Service performed as a member of the National Guard if the employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.

(9) Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her.

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